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State v. McGovern Appellant's Brief Dckt. 43544

SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43544
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR 2010-10620
v.	)	
	)	
JASON CURTIS MCGOVERN,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Jason McGovern appeals, contending the district court abused its discretion when it relinquished jurisdiction in his case. Because Mr. McGovern had demonstrated positive changes in his thinking, shown himself amenable to treatment, and completed all his assigned programs, the rider staff recommended, the district court suspend Mr. McGovern's sentence. An adequate review of the other mitigating factors in the record also supports that recommendation. As such, this Court should vacate the order relinquishing jurisdiction and remand this case for further proceedings.

Statement of Facts and Course of Proceedings

Mr. McGovern had been serving a five-year period of probation following his completion of a traditional rider program. (R., pp.120-21.) During that time, he earned a technical certificate for welding, making the Dean's List during two semesters of that program. (R., pp.162-64.) He completed the ordered community service. (R., p.169.) And, minutes of a subsequent evidentiary hearing indicate, according to his treatment provider, Mr. McGovern was progressing in his treatment efforts. (R., pp.249-50.)

The treatment was the result of Mr. McGovern's underlying conviction for possession of sexually exploitive material. (*See* R., p.92.) The treatment provider noted that, according to the tests he was administering, Mr. McGovern still presented a low risk of reoffending. (*See* R., p.250; *compare* Presentence Investigation Report (*hereinafter*, "PSI"), p.81 (the initial sex offender risk assessment conducted on Mr. McGovern noting he was in the low risk category to reoffend and appeared amenable to treatment).) The treatment provider also wanted to start integrating Mr. McGovern into a more pro-social lifestyle. (*See* R., p.250.) To help further that process, the treatment provider had approved several chaperones so Mr. McGovern might be around children safely as he took that next step in the treatment process. (*See* R., p.250.)

However, Mr. McGovern's probation officer still had concerns in that regard, and so, would not approve a chaperone. (*See, e.g.*, R., p.246.) For example, she was concerned that Mr. McGovern had been unable to complete a full disclosure polygraph examination. (*See, e.g.*, R., pp.157, 246 (alleging probation violations on that ground).) The minutes of a subsequent evidentiary hearing indicate Mr. McGovern's treatment

provider testified that Mr. McGovern's anxiety issues meant he is "[n]ot suitable for polygraphs because of his anxiety." (R., p.251; *see also* R., pp.176-77 (minutes from an evidentiary hearing on a previous allegation of probation violation hearing indicating other witnesses had offered similar testimony about Mr. McGovern's symptoms of anxiety). *But see* R., p.177 (minutes from the previous evidentiary hearing indicating a polygrapher testified that the polygraph should have been able to take Mr. McGovern's symptoms of anxiety into account). The district court had dismissed the previous allegations of failing to complete a full disclosure polygraph because it concluded the State had not proved a willful violation, as Mr. McGovern had always submitted for evaluation when he was requested to do so. (R., pp.178-79.)

Nevertheless, the probation officer issued another report of probation violation which alleged Mr. McGovern failed to complete more polygraph examinations. (R., p.184.) That report also alleged Mr. McGovern had not observed his curfew, not paid costs and fees, and had contact with children without an approved chaperone. (R., p.185.) However, the report clarifies that Mr. McGovern was talking with his brother, while children were playing in the immediate vicinity. (R., p.185.) After the warrant was issued, the probation officer added two other allegations, asserting she had seen Mr. McGovern around other children, and that he fled when he saw her. (R., pp.236-37.)

This time, the district court found the State had proved the alleged violations, though the two alleging Mr. McGovern's failure to complete the polygraph were withdrawn. (*See* R., pp.246-47.) The minutes of the evidentiary hearing indicate that, in reaching its decision, the district court determined the testimony from Mr. McGovern's

treatment provider was irrelevant. (*See* R., p.252.) As a result, three and one-half years after suspending the sentence, the district court revoked Mr. McGovern's probation, executed the underlying unified sentence of six years, with two years fixed, and retained jurisdiction. (R., pp.253-56.)

Mr. McGovern was placed in the sex offender rider program. (R., p.257.) The rider staff noted that he completed or would complete of all his assigned programs. (PSI, p.160.) They also noted he had no formal disciplinary sanctions entered against him during the rider program. (PSI, p.161.) However, they noted that he had several behavioral issues, which it described as a "covert behavior problem," such as "creating chaos among his peers." (PSI, p.161.) That behavior resulted in three informal sanctions. (PSI, p.161.) The rider staff concluded that this behavior appeared to be related to the pattern of misbehavior found during Mr. McGovern's period of probation. (PSI, p.164.) Nevertheless, the rider staff recommended the district court suspend Mr. McGovern's sentence. (PSI, pp.159, 171.) That recommendation was based on the fact that:

1. You [Mr. McGovern] appear to have made some positive changes in your thinking patterns, attitudes and beliefs.
2. You participated well in all activities and completed all assigned programs satisfactorily.
3. You were not seen as a serious disciplinary problem indicating you should be able to follow the rules of probation.
4. You appear to be amenable to sex offender treatment.

(PSI, p.171.) At the ensuing hearing, Mr. McGovern added that, if granted probation, he would have employment in his brother's handyman company. (Tr., p.6, Ls.7-8.) He also indicated he planned to resume his treatment with the same treatment provider. (Tr., p.6, Ls.17-24.)

However, the district court rejected the rider staff's recommendation: "how this author reaches the conclusion that you should be placed on probation is beyond me. It's unthinkable." (Tr., p.10, Ls.15-17.) As a result, it relinquished jurisdiction and executed Mr. McGovern's underlying sentence. (Tr., p.9, Ls.4-7; R., pp.260-61.) Mr. McGovern filed a notice of appeal timely from the order relinquishing jurisdiction. (R., pp.264-66.)

ISSUE

Whether the district court abused its discretion by relinquishing jurisdiction over Mr. McGovern.

ARGUMENT

The District Court Abused Its Discretion By Relinquishing Jurisdiction Over Mr. McGovern

The district court's decision to relinquish jurisdiction is reviewed under an abuse of discretion standard. *State v. Statton*, 136 Idaho 135, 137 (2001); *State v. Hurst*, 151 Idaho 430, 438 (Ct. App. 2011). Such a decision will not be considered an abuse of discretion "if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate." *State v. Merwin*, 131 Idaho 642, 648 (1998). "The purpose of retaining jurisdiction after imposing a sentence is to afford the trial court additional time for evaluation of the defendant's rehabilitation potential and suitability for probation." *State v. Lee*, 117 Idaho 203, 205 (Ct. App. 1990). Thus, in making that determination, the district court "considers all of the circumstances to assess the defendant's ability to succeed in a less structured environment and to

determine the course of action that will further the purposes of rehabilitation, protection of society, deterrence, and retribution." *Statton*, 136 Idaho at 137.

Under this standard, the district court's outright rejection of the rider staff's recommendation for probation was improper. (*See* Tr., p.10, Ls.15-17.) Despite his behavioral issues in the rider program, the rider staff explained Mr. McGovern had made progress by making positive changes to his thinking patterns, and so, still demonstrated the ability to succeed in a less-structured environment. (PSI, p.171.) Therefore, Mr. McGovern's rehabilitation potential made him suitable for probation. *See Statton*, 136 Idaho at 137. As such, the district court's conclusion that the rider staff's recommendation was unfounded constitutes an abuse of its discretion, as that conclusion failed to adequately consider the information in the rider staff's report.

Not only is the rider staff's recommendation borne out by the information in its report, that recommendation is consistent with the information in the rest of the record. Most notably, Mr. McGovern's treatment provider explained Mr. McGovern had been making progress in his treatment during his three and one-half years on probation. (*See* R., pp.249-50.) That demonstrates Mr. McGovern's ability to succeed in a less-structured environment. This is true despite the apparent disagreement between Mr. McGovern's treatment provider and his probation officer as to whether he was ready to move toward a more socially-engaged lifestyle, demonstrated by their differing opinions on whether Mr. McGovern's parents and his girlfriend should be approved as chaperones. (*Compare* R., p.250, *with* R., p.246.) Rather, the fact that Mr. McGovern had made progress while on probation, when combined with the fact that, while on the rider, he continued to progress in his rehabilitation efforts (PSI, p.171), demonstrates

the district court should have suspended his sentence for a period of probation. As such, the district court's decision to relinquish jurisdiction in this case is an abuse of its discretion.

CONCLUSION

Mr. McGovern respectfully requests that this Court vacate the order relinquishing jurisdiction and remand this case for further proceedings.

DATED this 29th day of March, 2016.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JASON C MCGOVERN
INMATE #98832
ISCC
PO BOX 70010
BOISE ID 83707

JOHN T MITCHELL
DISTRICT COURT JUDGE
EMAIL BRIEF

STACI L ANDERSON
CONFLICT PUBLIC DEFENDER
EMAIL BRIEF

KENNETH K JORGENSEN
CRIMINAL DIVISION
EMAIL BRIEF

_____/s/_____
MARY ANN LARA
Administrative Assistant

BRD/mal